

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

FREDDIE ERVIN,

Petitioner,

v.

Case Number: 06-CV-10004
Honorable Lawrence P. Zatkoff

HUGH WOLFENBARGER,

Respondent.

ORDER DENYING PETITIONER'S "MOTION TO REJECT RESPONDENT[']S FUTURE RESPONSE FOR REFUSAL TO FOLLOW THE COURT[']S ORDER TO RESPOND TO PETITIONER[']S HABEAS PETITION"

On January 3, 2006, Petitioner Freddie Ervin, a state prisoner currently confined at the Straits Correctional Facility in Kincheloe, Michigan, filed a *pro se* petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. (Dkt. # 1.) Before the Court is Petitioner's "Motion to Reject Respondent[']s Future Response for Refusal to Follow the Court[']s Order to Respond to Petitioner[']s Habeas Petition," which the Court construes as a "Motion for Judgment By Default." (Dkt # 14.) Petitioner seeks a default because he alleges that Respondent has failed to timely file his response. However, this contention is without merit.

On January 12, 2006, Magistrate Judge R. Steven Whalen signed an order of responsive pleading requesting Respondent to answer Petitioner's petition by July 10, 2006. (Dkt. # 2.) Subsequently, on June 9, 2006, Petitioner filed a motion to hold his case in abeyance so that he could return to state court to exhaust some newly-stated claims, which the Court granted on June 27, 2006. (Dkt. # 6.) The stay was conditioned on Petitioner presenting the newly-stated claims to the state courts within sixty days of the order and then returning to the Court with an amended petition within sixty days of exhausting those claims.

Petitioner returned to the Court on July 2, 2008, with an amended petition, and, at the same time, he requested that the Court reopen his case. (Dkt. # 9.) The Court granted Petitioner's request to reopen the case and ordered Respondent to answer Petitioner's amended petition by January 9, 2009. (Dkt. # 10.) Respondent complied. (Dkt. # 12.) Respondent also filed the necessary Rule 5 materials on January 28, 2009. (Dkt. #13). Thus, the Court denies Petitioner's motion as moot.

Furthermore, a default judgment is generally unavailable in a habeas corpus proceeding on the ground that government officials failed to file a timely response to the petition. *See, e.g., Allen v. Perini*, 424 F.2d 134, 138 (6th Cir. 1970).

Accordingly,

IT IS ORDERED that Petitioner's motion [dkt. # 14] is **DENIED** as moot.

S/Lawrence P. Zatkoff
LAWRENCE P. ZATKOFF
UNITED STATES DISTRICT JUDGE

Dated: April 27, 2009

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of this Order was served upon the attorneys of record by electronic or U.S. mail on April 27, 2009.

S/Marie E. Verlinde
Case Manager
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